

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

3 MIYOKO'S KITCHEN,

4 *Plaintiff,*

5 v.

6 KAREN ROSS, in her official capacity as
7 Secretary of the California Department of
8 Food and Agriculture, and STEPHEN
9 BEAM, in his official capacity as Branch
10 Chief of the Milk and Dairy Food Safety
11 Branch,

12 *Defendants.*

Case No. 3:20-cv-00893-RS

**DECLARATION OF MICHELE
SIMON IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION AND IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

13 I, Michele Simon, declare as follows:

14 1. I am the executive director of the Plant Based Foods Association (PBFA). I
15 offer this declaration to help the court understand the impact of recent actions taken by
16 the California Department of Food and Agriculture on producers and sellers of plant-
17 based foods like Miyoko's.

18 2. The Plant Based Foods Association (PBFA) is a trade association that
19 represents the leading manufacturers and sellers of 100% plant-based foods. We were
20 founded in 2016 to build a strong foundation for the plant-based foods industry to
21 succeed and thrive. I have been the executive director of PBFA since its inception when I
22 founded the organization with the five founding board members. Before that, I was a
23 successful public health attorney, food policy expert, and author. I helped start PBFA
24 because I saw the need for innovative food companies to have a collective voice in the
25 policy arena and marketplace.

26 3. PBFA has more than 300 company, affiliate, and investor members who
27 represent the unified voice of the plant-based foods industry. Of our 175 company-
28 members, at least 56 manufacture and sell plant-based dairy alternatives such as plant-

DECLARATION – MICHELE SIMON

Case No. 3:20-cv-893-RS

1 based cheese, ice cream, butter, and yogurt. At least 13 of those companies are based in
2 California, including Miyoko's Kitchen.

3 4. PBFA regularly engages at the state and federal level to assist lawmakers
4 understand the policies that affect the plant-based industry, and advocate for the interests
5 of its members. PBFA is actively engaged in fighting on the federal and state level to
6 defend its members' First Amendment right to common-sense labeling. We have worked
7 hard to develop and maintain positive and constructive relationships with policymakers
8 and officials at FDA and in states around the nation. Our aim to for our industry to
9 operate on a level playing field.

10 5. PBFA also developed comprehensive voluntary standards for the labeling of
11 plant-based dairy alternatives such as plant-based milk and yogurt. These standards
12 provide guidance to our industry members about how to label such products in a way
13 that is consistent and clear for consumers. PBFA recommends the that companies use
14 qualifying language like "vegan," "plant-based," or "dairy-free" when they use terms like
15 "milk," "yogurt," "butter," and "cheese." As far as I know, all our members that sell
16 plant-based alternatives in California use such qualifying language—including Miyoko's.
17 PBFA's goal is to promote clarity and consistency in the labeling of plant-based foods.

18 6. Over the past several years, as consumer demand and awareness has grown,
19 the plant-based food industry has expanded exponentially. Retail sales of plant-based
20 foods have skyrocketed in recent years, growing 11% just last year and 31% since early
21 2017.¹ Among the "leading drivers of plant-based sales" are plant-based milks and dairy
22 alternatives, which are expected to reach \$40 billion in annual sales by 2025.² At the same
23

24 ¹ Plant Based Foods Ass'n, U.S. Plant-Based Retail Market Worth \$4.5 Billion, Growing at 5x Total Food Sales, (July 12,
25 2019), <https://plantbasedfoods.org/2019-data-plant-based-market/>.

26 ² *Id.*; see Edlong, *Connecting with Consumers in Plant-based Dairy*, Food Dive (Nov. 19, 2019),
27 <https://www.fooddive.com/spons/connecting-with-consumers-in-plant-based-dairy/567437/>; Brian Kateman, *Plant-Based Butter Is Taking Over The Dairy Aisle*, Forbes (Apr. 28, 2020),
<https://www.forbes.com/sites/briankateman/2020/04/28/plant-based-butter-is-taking-over-the-dairy-aisle/#2d18581b7377>.

1 time that the sales of plant-based dairy alternatives are booming, however, sales of
2 traditional animal-dairy products have been decreasing.³

3 7. Many of PBFA's members sell (or plan to sell) their plant-based dairy
4 alternatives within the state of California, and many of them have production facilities
5 within the state.

6 8. In early December 2019, I became aware of a letter sent by the Milk and
7 Dairy Food Safety Branch to Miyoko's. I read the letter, which forbade Miyoko's from
8 using specific words, phrases, and images. The letter noted that Miyoko's labels and
9 website were illegal—and instructed Miyoko's to remove the word "butter" in the phrase
10 "cultured vegan butter," stop using the phrase "100% cruelty and animal free," and
11 remove an image of a "woman hugging a cow."

12 9. Unfortunately, this letter did not altogether come as a surprise to me. For
13 the past few years PBFA members have been reaching out to me after receiving similar
14 letters. Members look to me for guidance in my role as executive director of PBFA, and
15 thanks to my knowledge of laws and regulations. I am therefore aware of several other
16 companies that have received similar enforcement letters from the Milk and Dairy Food
17 Safety Branch. These letters prohibit companies from using clear and non-misleading
18 terms like "almondmilk yogurt," "vegan cheese" and the like.

19 10. PBFA's members have been forced to operate with a constant fear of
20 enforcement and in an environment of legal uncertainty. The PBFA members I have
21 spoken to who have received these letters are afraid of losing necessary licenses, being
22 fined, or worse. One member petitioned for the Milk and Dairy Food Safety Branch to
23

24 ³ CISION PR Web, *Plant Based Foods Sales Experience 8.1 Percent Growth Over Past Year*, (Sept. 13, 2017),
25 <http://www.prweb.com/releases/2017/09/prweb14683840.htm> (observing that "[t]he plant-based milk category is up 3.1
26 percent since last year" but "[o]ver the same period, according to the Nielsen data, cow's milk sales are down about 5
27 percent"); see also Giuliana D'Esopo, *Don't Cry over Plant-Based Milk: Why the Use of the Term "Milk" on Non-Dairy
Beverages Does Not Constitute "Misbranded" Under the Federal Food, Drug, and Cosmetic Act*, 14 J. Health &
Biomedical L. 481, 498 (2018) (noting that "[t]he dairy industry remains under pressure as the global non-dairy milk
market reached \$5.8 billion in 2014 and is predicted to reach \$10.9 billion by 2019").

1 adopt temporary standards so that it would not have to change its labels, but this petition
2 was denied.

3 11. The aggressive enforcement posture of the Milk and Dairy Food Safety
4 Branch has been an ongoing topic of conversation at PBFA board meetings, meetings with
5 individual members, and even in PBFA's policy work. It's no secret that the Milk and
6 Dairy Food Safety Branch has been targeting PBFA members in the state of California
7 after the National Milk Producers Federation began writing letters complaining to the
8 Branch about animal-based dairy's plant-based competitors.

9 12. I have no clear answers for companies who have received these types of
10 letters and threats from the Milk and Dairy Food Safety Branch. All I can tell them is that
11 the Milk and Dairy Food Safety Branch has the authority to revoke or withdraw necessary
12 licenses, impose civil and criminal penalties, and even pull their products from
13 supermarket shelves. Under the circumstances, even companies that have not received
14 enforcement letters themselves would be reasonable in rethinking their own marketing
15 and packaging practices based on seeing what happened to Miyoko's. It is also reasonable
16 to expect that, in response, companies will make changes or refrain from making changes
17 to their labels after seeing what happened to Miyoko's. There is no way for any plant-
18 based producer to rest assured that the Milk and Dairy Food Safety Branch's enforcement
19 position will not apply to them too.

20 13. Being able to use commonly understood terms like "vegan butter" and
21 "almondmilk" is essential for the success of PBFA members. It ensures consumers
22 understand what products will taste like, their consistency, and how they can be used.
23 But it is reasonable to expect that the Milk and Dairy Food Safety Branch's enforcement
24 actions will chill the speech of PBFA's members—causing them to reasonably feel a need
25 to choose between being able to truthfully convey what their products are to consumers
26 and facing severe enforcement action by the State of California.

27
28

DECLARATION – MICHELE SIMON

Case No. 3:20-cv-893-RS

1 14. We also don't know how many companies may not be moving forward with
2 their plans to start a new company due to the fear that the State of California is instilling
3 in this industry.

4 15. In short, the Branch's enforcement letters have made operating a successful
5 plant-based food business much more difficult within the state.

6 16. I have personal knowledge of the facts set forth in this declaration and could
7 and would testify to those facts if called as a witness.

8 17. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the
9 foregoing is true and correct.
10

11 5/25/2020

12 Executed this ____ day of May, 2020

DocuSigned by:

Michele Simon

B1B1EEC782A9409

Michele Simon

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION – MICHELE SIMON

Case No. 3:20-cv-893-RS